

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

The Ryan Company, Inc.

Case No. 05-0189-PWH

From an Assessment issued by:

Division of Labor Standards Enforcement.

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor The Ryan Company, Inc. ("Ryan") requested review of a civil wage and penalty assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("Division") with respect to the Humboldt State University Telecommunications Infrastructure Project ("Project"). A Hearing on the Merits was conducted on April 18, 2006, in San Francisco, California, and on May 2, 2006, in Sacramento, California, before Hearing Officer John Cumming. Brian D. Bertossa and Carrie E. Bushman of Cook Brown LLP appeared for Ryan, and Ramon Yuen-Garcia appeared for the Division. For the reasons set forth below the Director of Industrial Relations issues this decision modifying and affirming the Assessment in part, remanding it in part, and dismissing it in part.

SUMMARY OF FACTS

This case arises out of a public works construction project to modernize the telecommunications infrastructure on the campus of Humboldt State University in Arcata, California. Ryan built support structures and installed conduit and cable or wiring for voice, data, and video communication systems on 36 campus buildings. The company worked with some high voltage electrical wiring as well as low voltage telecommunication wiring. Some of its employees also did carpentry and excavation work to build support structures and lay conduit outside of buildings.

The Assessment presents two distinct sets of issues. First, for several months in the middle of the project (from mid-June, 2003 through the first part of January, 2004) Ryan employed its workers on a four-days-a-week, ten-hours-a-day schedule ("4/10 schedule") without

paying required overtime rates for the hours in excess of eight in a day. The second issue concerns how Ryan classified its workers for purposes of determining the applicable prevailing wage. Principally this issue involves the whether Ryan had to pay the Inside Wireman prevailing wage rate for all of the telecommunications installation work as well as three other workers whose work raise other classification issues. There were also isolated issues concerning individual employees and a challenge to the overall accuracy of the Division's audit, which are discussed further below.

The 4/10 Work Schedule:

Ryan's West Coast Operations Manager Charles Conroy served as on-site project superintendent during much of the Project. Conroy testified that Ryan did not have a 4/10 schedule at the outset of the Project, but some of the employees began to request such a schedule. During an on-site visit from Deputy Labor Commissioner Kurt Barthel¹ Conroy asked about switching to a 4/10 schedule:

"I asked him ... I had a lot of requests that people were complaining saying they were away from home, they didn't want to just sit around the hotel, they'd just as soon work if I can let them, and I said, "Is there any way they can work four ten hour days? It saves them another day's lunch, supper, you name it, and they can go back to be with their families," and he said, "Well, you can do it if you follow the guidelines of [Wage Order 16-2001]."

...

"He told me to follow the guidelines in here for a secret ballot and if everyone was unanimous on the vote or better than 50 percent as outlined in the secret ballot, then it would be okay to do so."

Conroy further testified that he was given a copy of a Wage Order 16-2001 by Barthel, that he followed the instructions in the Wage Order for adopting a 4/10 schedule and that the employees voted unanimously for the 4/10 schedule. (*see* Cal. Code Regs., tit. 8, §11160(3)(C).) After obtaining clearance from his own manager within the company, Conroy implemented the schedule. He testified that he would not have done so if Barthel had told him it was not permitted. However, Conroy acknowledged that he had seen the project con-

¹ Barthel did not work in the prevailing wage enforcement, but was there concerning Ryan's failure to pay a recently terminated employee his final check.

tract specification that required overtime payments for work in excess of eight hours per day and the statutory penalties for violations.

Ryan later discontinued the 4/10 schedule after its parent company's legal department determined that the practice was inappropriate "no matter who said what." Ryan concedes that it violated applicable prevailing wage requirements in allowing this schedule, but contends that it instituted the schedule pursuant to the advice of one of the Division's Deputy Labor Commissioners and consequently that the Division should be estopped from imposing any penalties for the violations, including overtime penalties under Labor Code section 1813.² Ryan issued checks to reimburse its workers for the unpaid overtime on the eve of the hearing on the merits in April of 2006.³

Classification of Workers as Inside Wiremen or Communication & System Installers:

The electrical work on this project was governed by General Prevailing Wage Determination HUM-2002-2. That Determination included published wage rates for the classifications of Inside Wireman, Communication & System Technician, and Communication & System Installer. According to advisory scopes of work that accompany the Determination, an Inside Wireman handles any work involving high voltage electrical systems, while the Communications & Systems Technician and Installer classifications are for low voltage system work. Allowable and excludable tasks are spelled out in considerable detail for these latter classifications, addressing dozens of types of sound, voice, alarm, video, and security systems and transmission modalities. Hearing testimony focused in particular on the following language from the scope of work description for the Communications & Systems Installer classification:

² All statutory references are to the Labor Code, unless otherwise noted.

³ The Division identified five workers who were reimbursed for fewer overtime hours than reflected in Ryan's payroll records. Those records support the Division's contentions as to four of the workers: Richard E. Coyne (underpaid by 12 hours), Robert C. Cutter (2 hours), Timothy Dill (2 hours), and Dennis Duggan (8 hours). As to the fifth worker Sergio Penuelas, Ryan made no additional payment to him despite the 26 hours of daily overtime reflected on its own certified payroll record and the Division's audit worksheet for the week ending June 21, 2003. The Division further argues that a single line entry on Exhibit 35 supports a further payment of overtime to Penuelas for the week ending July 5, 2003. However, Exhibit 35, which appears to be a Division audit record, does not by itself support an inference or finding that Penuelas was underpaid or subject to prevailing wage in that week; and there is no other information in the record that would support that inference or finding.

"F. This will serve to clarify that the following items are included within the scope of work permitted under this Addendum: J-hooks; Teardrops; Trapezes (ceiling wire with horizontal support – i.e. EMT); Innerduct for VDV on occupied job sites only.

"II. This Agreement specifically excludes the following work:

"A. Raceway systems are not covered under the terms of this Agreement (excluding Ladder-Rack for the purpose of the above listed systems). Chases and/or nipples (not to exceed 10 ft.) may be installed on open wiring systems."

Ryan used the Communication & System Installer classification predominantly but not exclusively for most of its electrical workers. Ryan also consistently classified and paid some workers as Inside Wiremen, and in some instances split the time between the two classifications for a particular worker on a particular day or week.

The Division reclassified all except one of Ryan's electrical workers as Inside Wiremen with respect to all of the telecommunications installation work performed on the Project based on descriptions of the work from some employees, the scope of work provisions, and the contract specifications. The Division received complaints, questionnaires, and correspondence from some of the workers, and during its investigation spoke with about nine of them. The investigating Deputy Labor Commissioner Martin Schmid acquired the overall impression that the employees were mostly performing Inside Wireman work in light of repeated references to "raceways" and "conduit", including conduit runs of well over ten feet, and descriptions of photographs provided by one of the complainants. On cross-examination, Schmid conceded that he did not know the meaning of some of the terms in the scope of work provisions and based his understanding of terms such as "raceway systems," "ladder rack," and "chase" on what the workers told him. As the same time, he observed that employees would interchange terms, and he did not believe the workers themselves knew which duties belonged in which classification.⁴

⁴ Schmid offered this as an explanation for why he classified George Beacannon as an Inside Wireman for all of his work on the Project despite Beacannon's own estimate that he devoted 90 percent of his time to sound and communication installer work.

The Division offered the testimony of two workers on the nature of work performed on the Project. Kenneth Ashe testified that he has been an electrician since 1986 and worked on the Project for several months installing raceways, cable trays, and metal piping inside the buildings. Ashe recognized an EMT in one of the photographs and believe it could only be installed by an electrician (contrary to the specific Communication and Systems Installer scope of work language quoted above). Ashe did not seem to recognize the term "Inside Wireman," apparently believing that it had to do with whether the work was inside or outside the building. He distinguished between installer and electrical work, calling the work on the Project the latter because it required an electrician's tools and knowledge. The other worker, Zachary Taylor, who had no prior training as an electrician, testified that he dug trenches, laid pipes outside, installed cement call boxes outside, and installed piping and cable tray inside.

Conroy testified with specificity about the electrical work on the Project, addressing first the systems and terminology in the Scope of Work Provisions for Communications & Systems Installers and Technicians what kinds of systems and specific items Ryan was installing at the Project. Conroy also covered the high voltage work, which he said was compensated at the Inside Wireman rate. Conroy identified specific items in photographs of the Project, with his descriptions generally matching those provided by Ashe. After covering the systems and installation work in general, Conroy testified about each individual worker, stating how that worker was assigned, indicating whether and why the work was classified as Communication & System Installer or Inside Wireman, and, where applicable, responding to information provided by the worker to the Division.

Other Classification Issues and Evidence:

In its Assessment the Division reclassified John Davis and Rufus Cooke from Communication & Systems Installer to Cement Masons based on their description of their work. Their joint statement supported by testimony at the hearing said in part:

We ... were hired ... to excavate for, install underground conduits and construct concrete foundations for emergency call boxes at Humboldt State University. These assignments required us to remove asphalt, concrete or landscaping, trench for underground electrical and telephone, run conduit, backfill and compact trenches, excavate for call box foundations, set re-bar cages, build

forms and bracing for concrete and bolt templates, pour concrete or asphalt for finish grade and replace landscaping.

The statement added that they operated a backhoe almost daily, that they also operated a mini excavator, and that they had been requested to keep track of their hours operating the backhoe. The two did some hand digging and mostly put the dirt excavated by hand into the backhoe. A list of total hours for each week operating the backhoe was submitted.⁵

Conroy testified that the backhoe was really a tractor that included a backhoe, that he had only seen the workers use it upon his return (after being away from the Project for a period of time), and that according to someone else the workers used the backhoe to hold shovels and brooms. Conroy testified that he never saw Davis or Cooke operate the backhoe; but he did see Davis drive the tractor. Ryan paid both workers the Communication & System Installers rate because their work was "more than labor", although the rates for laborer classifications that Conroy read into the record were in fact higher. The Division also disputed its own determination to reclassify Cooke and Davis as Cement Masons, arguing instead that they were entitled to still higher prevailing rates as Operating Engineers for their backhoe work and as Inside Wiremen for the balance of their work.

Another worker Sergio Penuelas was listed on one certified payroll report as a Truck Driver being paid a flat rate of \$20.00 per hour for a total of 50 hours of work on three consecutive days in June of 2003. Conroy testified that Penuelas' sole engagement on the project was to make one delivery. No one explained Penuelas' listing on the certified payroll report or provided specifics as what he did. The Division reclassified Penuelas as a Teamster Group 2, requiring payment at the rates of \$38.12 per hour for regular time and \$50.63 per hour for the 26 hours of daily overtime.

In addition to disputing the basis for the reclassifications, Ryan identified numerous discrepancies in the audit calculations underlying the Assessment, ultimately contending that the Assessment was so unreliable as to require dismissal in its entirety. Schmid conceded several instances of wage credits and assessments being attributed to the wrong employees

⁵ The hours in the attachment total to 377, which is approximately half of the total number of hours for each worker on the project as reflected in the Audit Summary attached to the Assessment.

due to shared initials, through correct in substance. He also conceded instances of Labor Code section 1775 penalties being assessed when employees were paid *more* than the required minimum prevailing rate and 13 instances (10 involving Curtis Cross and 3 involving John Davis) in which section 1813 penalties were assessed despite there being no record of overtime having been worked. However, the Division contended that its Assessment was substantially correct in its determination of liability, even if erroneous in some of the details.

PROCEDURAL HISTORY AND PENALTY DETERMINATION

The Division issued its Assessment on September 12, 2005, finding Ryan liable for back wages in the amount of \$124,461.91 plus \$61,040.00 in penalties under section 1775 (assessed at the rate of \$40 per violation for 1,526 violations) and \$35,650.00 in section 1813 penalties (assessed at the rate of \$25 per violation for 1,426 violations). The section 1775 penalties were determined by Senior Deputy Labor Commissioner Charlie Atilano, who found that the use of the Communication & System Installer classification not in good faith but that a reduction to \$40 per violation was warranted because Ryan had no prior history of violations. Atilano also testified that he did not take into consideration the overtime violations based on the 4/10 work schedule in setting the section 1775 penalties.

Ryan filed a timely request for review of the Assessment on November 2, 2005. On the morning of the first day of hearing, April 18, 2006, Ryan reported and provided documents to show that it had issued checks in the aggregate amount of \$33,619.39 to employees named in the Assessment to cover its liability for daily overtime based on use of the 4/10 work schedule. (See text at footnote **Error! Reference source not found.3**, *supra*.) In calculating these payments Ryan used the classifications it previously had ascribed to these workers. The Division's opening post-trial brief essentially conceded the accuracy of these payments except as to rates used and the specific calculations of hours for the five employees, as discussed in footnote 3 above.⁶

⁶ The Division filed one motion to amend the Assessment, which was denied by the Hearing Officer, and submitted amended audits with revised calculations up through its final brief, which Ryan in turn challenged with its own calculations and comparisons of earlier audits to later ones. The modifications to the Assessment made by this Decision are based on adjusted calculations which appear to be undisputed by the parties and do not represent any increase in the amounts originally assessed by the Division.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects.

The overall purpose of the prevailing wage law ... is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 (citations omitted).) The Division enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§90.5(a), and see *Lusardi, supra*.)

Section 1775(a) requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate, and also prescribes penalties for failing to pay the prevailing rate. Section 1742.1(a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following the service of a civil wage and penalty assessment. Section 1743(a) provides that the "contractor and subcontractor shall be jointly and severally liable for all amounts due pursuant to a final order" fixing prevailing wage liabilities, although other sections limit the contractor's liability for certain penalties assessed against a subcontractor.

When the Division determines that a violation of the prevailing wage laws has occurred, a written civil wage and penalty assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal that assessment by filing a Request for Review under section 1742. In that appeal the contractor or subcontractor "ha[s] the burden of proving that the basis for the civil wage and penalty assessment is incorrect." (§1742(b).)

Ryan is Liable for Some of the Assessed Wages.

Liability for Daily Overtime Based on 4/10 Schedule: Ryan concedes its liability for underpayment of overtime wages when it used the 4/10 schedule. In addition to the payments previously made, Ryan is liable for the difference between the regular rate paid and prevailing overtime rates required for an additional 12 hours for Richard E. Coyne at the Communication & System Installer rate, 2 hours for Robert C. Cutter and 2 hours for Timothy Dill at the Inside Wireman rate, 8 hours for Dennis Duggan at the Carpenter rate, and 26 hours for Sergio Penuelas at the Teamster rate.

Dispute over Classification of Workers as Inside Wireman or Communication & System Installers: With regard to the principal dispute over use of the Inside Wireman or Communication & Systems Installer classifications, Ryan has carried its burden of proving "that the basis for the ... [A]ssessment is incorrect." Accordingly Ryan is not liable for any underpayment of wages based on its allocation of work between the two classifications. The Division's determination to reclassify all of this work as Inside Wireman appears to have derived in the first instance from complaining workers' references to work on raceway systems and other items that Schmid incorrectly understood to be excluded from the scope of work for a Communication & Systems Installer. Schmid did not understand the nature of the work and precise meaning of these terms. Thus, the Division did not have an adequate basis for finding that these workers were misclassified;

The Division also contends that the installation of more than ten feet of conduit in aggregate on the entire project required that all electrical work be classified as Inside Wireman. On its face, this is a highly improbable interpretation of the ten foot limitation expressed in the Scope of Work Provisions for the Communication & System Installer and logically applies to single conduit runs rather than the entirety of a project. The Division's interpretation would preclude use of a Communication & System Installer for all but the smallest installation jobs that could be accomplished in a few hours by a single worker and would

seem to make much of the detail in the Scope of Work provisions superfluous.⁷

Ryan, as the party performing the work, was in the best position to prove that its classification choices were correct in order to meet its burden. Ryan has met this burden through the Conroy's specific and credible testimony about what each employee was doing and why the Inside Wireman or Communication & System Installer classification was chosen for a given part of the work. Ryan's pay rate determinations may not have been perfectly accurate, but they are far more specific and reliable than the Division's in terms of matching the classifications to the actual work performed and the Scope of Work requirements for the relevant classifications. Accordingly, this part of the Assessment, including all related penalties, is dismissed.

Classification of Davis and Cooke: Ryan failed to establish that wage assessments for these two workers were incorrect, and accordingly that part of the Assessment must be affirmed. Davis presented credible testimony based on his personal knowledge concerning the backhoe work. The written statement and list of days and hours doing backhoe work that he and Cooke submitted constituted "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." (*Andersen v. Mt. Clemens Pottery Co.* (1945) 328 U.S. 680, 687; *followed in Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727.) The burden then shifted to Ryan to come forward with better, specific, evidence to rebut that showing. (*Id.*) Conroy's observations that the equipment was really a tractor with a backhoe, that he personally had not observed these workers operating the backhoe, and that someone else said they had been using it as a wheelbarrow were not adequate rebuttal evidence. Because the Assessment determined that Davis and Cooke were entitled to the prevailing rate for Cement Masons for their backhoe work, the Assessment is affirmed at that rate rather than at the higher Operating Engineer rate belatedly sought by the Division at the hearing.

⁷ The Hearing Officer properly excluded a letter dated June 14, 2002, from former Chief Deputy Director Chuck Cake to Robert C. Stewart of Stewart Communications in Eureka, which was offered to bolster this theory. There was no testimony or other evidence showing how or why the letter was generated or what relevance it would have to this dispute, and Schmid conceded that he had never seen the letter until approximately a week prior to the second day of hearing in this case.

Penuela: Penuela's presence on Ryan's certified payroll record was sufficient evidence that Ryan treated him as employed in the execution of the contract and entitled to the prevailing rate for the listed occupation of trucker. (§§1771, 1772, and 1774.) Ryan offered no explanation why Penuela was listed if the company believed he was not an employee or not entitled to prevailing wage. Penuelas' entitlement is affirmed as determined in the Assessment without the increase in hours sought by the Division in its post-hearing brief. (See note 4 above.)

Summary: It is not necessary to address other wage calculation errors raised by Ryan, because the balance pertain to determinations that are being dismissed by this decision. In light of the foregoing discussion and determinations, the determination of unpaid wages is modified as follows:

Based on its failure to pay daily overtime while employing workers on a 4/10 schedule, Ryan is liable for the \$33,619.39, that it previously conceded to be due and paid, as well as for the following additional amounts (based on the difference between the overtime and straight time rates for the hours and classifications reported):

| | |
|--|-------------------|
| Richard E. Coyne, Comm. & Sys. Install. (12 hours @ \$12.52) | = \$150.24 |
| Robert C. Cutter, Inside Wireman (2 hours @ \$13.45) | = \$ 26.90 |
| Timothy Dill, Inside Wireman (2 hours @ \$13.45) | = \$ 26.90 |
| Dennis Duggan, Carpenter (8 hours @ \$11.635) | = <u>\$ 93.08</u> |
| Subtotal | = \$ 397.12 |

Ryan is liable to John Davis and Rufus Cooke for the difference between the Cement Mason rate and the Communication & System Installer rate paid for the hours spent operating a backhoe (377 hours @ \$6.48), totaling \$2,442.96 each. Ryan is also liable to Sergio Penuelas for the back wages set forth in the original Assessment totally \$1,231.26. Ryan is liable in aggregate for \$40,133.69 in back wages, less credit for amounts previously paid toward these specific liabilities. All other wage assessments are dismissed.

The Penalties Assessed under Labor Code §1775(a) Must be Re-
manded for Redetermination by the Division.

Section 1775(a) states in relevant part as follows:

“(1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars (\$50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

“(2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

“(i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.

“(ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

“* * *

“(D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.

“* * *

Abuse of discretion is established if the Labor Commissioner “has not proceeded in the manner required by law, the [determination] is not supported by the findings, or the findings are not supported by the evidence.” (Code Civ. Pro., §1094.5(b).) In reviewing for abuse of discretion, however, the Director is not free to substitute his own judgment “because in [his] own evaluation of the circumstances the punishment appears to be too harsh.” (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95 at 107.)

In this case, the Division assessed over 1,500 penalties, associated in most instances with using lower-paying classifications than the ones deemed appropriate by the Division. The Division set the section 1775 penalties at the level of \$40 per violation based on its conclusion that Ryan had not acted in good faith in classifying workers as Communication & System Installers rather than as Inside Wiremen, but also in light of the absence of any prior

record of prevailing wage violations by Ryan. Underpayments based on use of the 4/10 schedule did not factor into the determination of this penalty amount.

Ryan is only liable for penalties based on the actual prevailing wage violations upheld in the preceding section. Under those findings, the number of violations is far fewer, and the Division's principal rationale for setting the penalty amount at \$40 per violation, *i.e.* the overtime violations, no longer exists. It necessarily follows that the Division abused its discretion in determining the penalty amount.

Because the discretion to set penalty amount is vested in the Labor Commissioner rather than the Director, the section 1775 penalty assessment must be remanded for reconsideration and redetermination in light of this decision. In this case, that shall include a recalculation of the number of violations upheld by this decision as well as a redetermination of the amount of penalties imposed for each violation. The Division shall have additional time to issue and serve a new penalty assessment under section 1775 as set forth in the Order below. Should the Division issue a new penalty assessment, Ryan shall have the right to request review in accordance with section 1742, and may request such review directly with the Hearing Officer, who shall retain jurisdiction for this purpose.

Ryan is Liable for Penalties Assessed under Section 1813.

Section 1813 states in relevant part as follows:

"The contractor or subcontractor shall, as a penalty to the state ..., forfeit twenty-five dollars (\$25) for each worker employed in the execution of the contract by the respective contractor or subcontractor for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. ..."

Labor Code §1815 authorizes overtime work on public works projects only if the employees are paid at least 1½ times the prevailing rate for work in excess of 8 hours in a day or 40 hours in a week. Failure to pay this required rate for overtime constitutes a distinct violation under section 1813. Unlike the penalties assessed under section 1775, the Division has no discretion to vary the amount of section 1813 penalties assessed for each violation of overtime requirements.

Here the Division assessed section 1813 penalties for 1,426 overtime violations, all of which are attributable to the use of the 4/10 schedule. The Division conceded that 10 were assessed in error by its computer program. Ryan has identified 23 others that were misattributed to the wrong employees, again due to a computer error, but which represent actual violations as to other employees. Since the penalties are payable to the state rather than the workers, Ryan was not prejudiced by the misattribution.

Ryan's other defense to all of these penalties is that the Division should be estopped to impose them in light of Barthel's advice to Conroy about using a 4/10 schedule.

“Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.”

(*Waters v. Division of Labor Standards Enforcement* (1987) 192 Cal.App.3d 635, 641.)

In *Waters* the court also observed that “the doctrine of equitable estoppel may be applied against a governmental entity unless its application “would result in the nullification of a strong rule of policy adopted for the benefit of the public.” (*Id.*, 192 Cal.App.3d at 641.)

A party relying on estoppel “must prove all of the elements” (*State Compensation Insurance Fund v. Workers' Compensation Appeals Board* (1985) 40 Cal.3d 5, 19), “leaving nothing to surmise or questionable inference.” (*Landberg v. Landberg* (1972) 24 Cal.App.3d 742, 759.) Ryan has not done so here. First, there was no showing that Barthel was aware that he was being asked about the requirements of prevailing wage law in specific reference to Ryan's work on the Project, nor was Barthel shown to have been aware of the specific overtime requirements in Ryan's contract. Second, there is no evidence that Barthel offered information about Wage Order 16-2001 with the intent of inducing Ryan to adopt a 4/10 schedule. Third, Ryan itself was not ignorant of the true facts; it knew that it was working on a prevailing wage project and that its contract expressly covered the obligation to pay overtime for working an excess of eight hours per day.

The amount of penalties assessed under section 1813 is reduced to \$35,400.00 based on 1,416 violations. As modified, the assessment of section 1813 penalties is affirmed.

Ryan is Liable for Liquidated Damages.

Section 1742.1(a) provides in pertinent part as follows:

“After 60 days following the service of a civil wage and penalty assessment under Section 1741 ..., the affected contractor, subcontractor, and surety ... shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment ... subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the assessment ... to be in error, the director shall waive payment of the liquidated damages.”

Rule 51(b) [Cal.Code Reg., tit. 8, §17251(b)] states:

“To demonstrate “substantial grounds for believing the Assessment ... to be in error,” the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the Assessment ... was in error; (2) that there is an objective basis in law and fact for the claimed error; and (3) that the claimed error is one that would have substantially reduced or eliminated any duty to pay additional wages under the Assessment”

In accordance with the statute, Ryan is liable for liquidated damages only on the wages found due in this decision that remained unpaid sixty days following service of the Assessment, or a total of \$40,133.69.⁸ Over 80 percent of these wages are attributable to overtime violations arising out of use of the 4/10 schedule. Ryan had no objective basis in fact or law for believing those wages to have been assessed in error; its arguments at the hearing were directly solely to its liability for penalties. Furthermore, Conroy's testimony established that Ryan did not believe that this part of the Assessment was in error. While Ryan was still working on the Project, it discontinued the 4/10 schedule based on its own, internal, conclusion that the practice was improper. Yet inexplicably it took no action to make its workers whole until it was ready to go to trial in this matter two years later.

As to the wages due to Davis, Cook, and Penuelas, Ryan failed to present sufficient facts or legal arguments to at least justify the underpayments, even if Ryan could not defeat the Division's showing. Consequently, Ryan is not entitled to a waiver of liquidated damages on any of the wages remaining due.

FINDINGS

1. Affected subcontractor The Ryan Company, Inc. timely requested review of a civil wage and penalty assessment issued by the Division of Labor Standards Enforcement with respect to the Humboldt State University Telecommunications Infrastructure Project.

2. The Ryan Company underpaid its workers by failing to pay the prevailing daily overtime rate for hours in excess of eight hours in a day while employing workers on a four-days-a-week, ten-hours-a-day schedule. The Ryan Company's total liability for these wage underpayments is \$34,016.51, as set forth in the body of this decision, less credits for payments already made.

3. The Ryan Company established that the basis of the Assessment was incorrect with respect to the reclassification of Communication & System Installers as Inside Wiremen. The Ryan Company is not liable for assessed back wages attributable to this reclassification.

4. The Ryan Company failed to establish that the basis of the Assessment was incorrect with respect either to the reclassification of John Davis and Rufus Cook as Cement Masons for hours worked operating a backhoe or to the determination that Sergio Penuelas was entitled to prevailing wages as a Teamster. The Ryan Company's total liability for these wage underpayments is \$6,117.18, as set forth in the body of this decision.

5. In light of Findings 2 through 4 above, The Ryan Company's total liability for wages under the Assessment is \$40,133.69, less credits for payments already made.

⁸ Ryan paid \$33,619.39 in satisfaction of most of the unpaid overtime wages on the eve of trial, nearly seven months after issuance of the Assessment and thus much too late to avoid imposition of liquidated damages on that amount.

6. The Division overassessed the number of violations that are subject to penalties under section 1775(a), and the Division also abused its discretion in determining the amount of penalties assessed per violation. The Assessment of \$61,040.00 in section penalties is vacated and remanded for redetermination of both the number of violations and of the penalty amount in light of the appropriate factors and other findings set forth and discussed in the body of this Decision.

7. The record establishes 1,416 violations under Labor Code §1813, and The Ryan Company has failed to establish grounds to equitably estop the Division from assessing and collecting these penalties. The Ryan Company is liable for these penalties at the rate of \$25.00 per violation for a total of \$35,400.00 in penalties under section 1813.

8. In light of Finding No. 5 above, the potential liquidated damages due under the Assessment is \$40,133.69. No part of these back wages was paid within sixty days following service of the Assessment, and The Ryan Company has not demonstrated that it had substantial grounds for believing the assessment of these wages to be in error. Accordingly, The Ryan Company is liable for liquidated damages in the amount of \$40,133.69 under section 1742.1(a).

9. The amounts found and remaining due in the Assessment as modified and affirmed by this Decision are as follows:

| | |
|---|----------------------|
| Wages Due: | \$ 40,133.69 |
| Penalties under section 1775(a) | <i>remanded</i> |
| Penalties under section 1813 | \$ 35,400.00 |
| Liquidated Damages under section 1742.1 | <u>\$ 40,133.69</u> |
| TOTAL | \$115,667.38* |

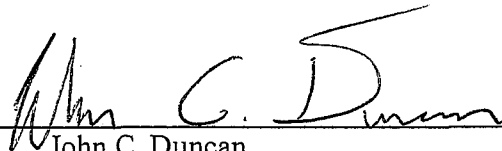
*In addition, interest is due and shall continue to accrue on all unpaid wages as provided in Labor Code §1741(b).

ORDER

The Civil Wage and Penalty Assessment is modified and affirmed in part, dismissed in part, and remanded in part, as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

The Division shall have thirty (30) days from the date of service of this Decision to issue and serve a new penalty assessment under section 1775(a). Should the Division issue a new penalty assessment, The Ryan Company shall have the right to request review in accordance with section 1742, and may request such review directly with the Hearing Officer, who shall retain jurisdiction for this purpose.

Dated: 8/5/08


John C. Duncan
Director of Industrial Relations